

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6074

In Th

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-6074

B

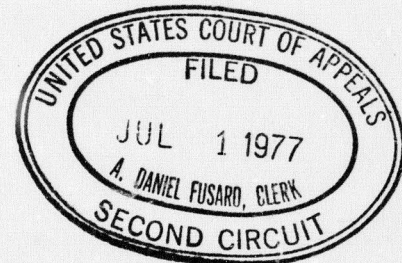
APPEAL
FROM THE
UNITED STATES DISTRICT COURT
for the
DISTRICT OF CONNECTICUT

WESTPORT TAXI SERVICE, INC.,
MICHAEL AND ANTHONY GILBERTIE,

PLAINTIFFS-APPELLANTS,

VS.

WILLIAM T. COLEMAN, JR.,
SECRETARY OF TRANSPORTATION,
WESTPORT TRANSIT DISTRICT,
PAUL R. GREEN, JOHN E. MEYERS,
AND RICHARD BRADLEY



DEFENDANTS-APPELLEES.

APPELLANTS' BRIEF

Submitted by:

RICHARD A. SILVER
DAVID S. GOLUB
ATTORNEYS for the Plaintiffs-
Appellants

733 Summer Street
Stamford, Connecticut 06905

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. JURISDICTIONAL STATEMENT	4
II. ISSUES PRESENTED	5
III. STATEMENT OF THE CASE	6
IV. ARGUMENT	
A. THE UMTA GRANT MUST BE INVALIDATED, AND APPROPRIATIONS THEREUNDER EN- JOINED, BECAUSE THE GRANT APPLICA- TION AND THE UMTA APPROVAL DO NOT CONTAIN THE CERTIFICATION AND FINDINGS REQUIRED BY THE ACT.	15
1. SUBSECTION 1602e PLAINLY APPLIES TO DEMONSTRATION PROJECTS.	15
2. SUBSECTION 1602d PLAINLY APPLIES TO DEMONSTRATION PROJECTS	29
B. THE DEMONSTRATION PROJECT UN- CONSTITUTIONALLY INFRINGES UPON THE PLAINTIFFS' FEDERAL AND STATE STATUTORY RIGHTS TO BE FREE OF SUCH COMPETITION, AND, ACCORDINGLY, IMPE- MENTATION OF THE PROJECT MUST BE ENJOINED.	34
1. PLAINTIFFS HAVE A FEDERAL STATUTORY RIGHT, UNDER §1602e OF THE ACT TO BE FREE OF UMTA- FUNDED COMPETITION APPROVED IN VIOLATION OF THE SUBSECTION	35
2. PLAINTIFFS HAVE A STATE STATUTORY RIGHT TO BE FREE OF INFRINGEMENT WITH THEIR FRANCHISE	38
V. CONCLUSION	42

TABLE OF AUTHORITIES

<u>A. CASES</u>	<u>PAGES</u>
Alabama Power Co. v Ickes, 302 U.S. 464 (1938)	39
American Telephone and Telegraph Company v FCC, 503 F. 2d 612 (2nd Cir 1974)	18, 30
Caminetti v United States 242 U.S. 470 (1917)	18, 30
De Freese v United States, 270 F 2d 730 (5th Cir. 1959), cert. den. 362 U.S. 944 (1960)	18
Frost v Corporation Commission, 278 U.S. 515 (1929)	34, 39, 41
Hardin v Kentucky Utilities Co, 390 U.S. 1 (1968)	34, 35
Helvering v Hammel, 311 U.S. 504 (1941)	18
Lynch v Household Finance Corp., 405 U.S. 538 (1972)	36
Meyer v United States, 175 F2d 45 (2nd Cir. 1949)	31
O'Shea v Littleton, 414 U.S. 488 (1974)	35
Packard Motor Car Company v NLRB, 330 U.S. 485 (1947)	18
Semmes Motors, Inc. v Ford Motor Co., 429 F. 2d 1197 (2nd Cir. 1970)	40
Steffel v Thompson, 415 U.S. 452 (1974)	41
Tennessee Electric Power Co. v Tennessee Valley Authority, 306 U.S. 118 (1939)	39
Township of Ridley v Blanchette, F Supp. (E.D. Pa 1976)	30
Trafficante v Metropolitan Life Insurance Co., 409 U.S. 205 (1972)	35
United States v Blasius, 397 F.2d 203, (2nd Cir. 1968), cert. <u>dism.</u> 393 U.S. 1008 (1969)	18, 30
United States v Brooklyn Union Gas Co., 168 F.2d 391 (2nd Cir. 1948)	41
United States v Oregon, 366 U.S. 643 (1961)	18, 30
United States v Vargas, 380 F Supp 1162 (E.D.N.Y. 1974)	31
Wirtz v Teamsters Local 191, 321 F.2d 445 (2nd Cir. 1963)	18, 20, 30

B. OTHER AUTHORITIES

	<u>Page</u>
Bautz, <u>Taxicab Management</u> , "UMTA's Current Involvement with the Taxicab Industry"	24, 25, 26
41 CFR 46412-3	24, 25
Conn. PUCA Reg 15-319-15	8, 28
Orski, <u>Taxicab Management</u> "UMTA's View of the Role of Taxicabs in Public Transportation"	24, 25
1964 U.S. Cong. Code and Admin News	1, 20, 21, 28
1966 U.S. Cong. Code and Admin News	19
1970 U.S. Cong. Code and Admin News	19

INTRODUCTION

In 1964, Congress passed the Urban Mass Transportation Act [UTMA] 49 U.S.C. §1601 et seq., legislation intended to provide federal funding for use by state and local bodies to improve the quality of mass transportation systems throughout the United States. The Act was designed not to promote public ownership of transit systems, but rather "to help existing private companies to stay in business and to improve the transportation services they offer." 1964 U.S. Congressional Code and Administrative News 2584.

In order to insure the maximum participation of existing private transit companies in federal projects and compensation to such companies for any federally-funded acquisition of their property or franchise interests, Congress carefully specified that "[n]o financial assistance shall be provided under this Act" for a project that competes with an existing company, unless the Secretary finds that the proposed project will (1) insure the maximum participation of existing companies in the project and (2) provide adequate compensation, under applicable state law, for any taking of equipment, or franchise interests occurring as a result of the project. 49 U.S.C. §1602e. Congress also imposed on applicants for grants or loans that substantially affect a

community or its mass transportation services a requirement that the applicants certify that hearings were held to consider the economic, social and environmental impact of the project on the community. 49 U.S.C. §1602d.

Plaintiffs-appellants Michael and Anthony Gilbertie own and operate plaintiff-appellant Westport Taxi Service, Inc., a small taxicab-business licensed by the Connecticut Public Utilities Control Authority to provide taxi service to the Westport, Connecticut area. The Plaintiffs' father purchased the business 22 years ago for \$35,000.00, and the Gilbertie family has operated the business since then. The plaintiffs have not sought a rate increase since 1970.

The Westport Transit District, a municipal body of the Town of Westport, Connecticut, has recently applied for federal funding, under UMTA, to establish a municipal, subsidized low cost taxi service in the Westport area in direct competition with the plaintiffs' business. Implementation of the service will necessarily make it impossible for Westport Taxi to continue profitable operations. The Transit District has offered the Gilberties jobs as the District's employees, but has made no offer that would allow Westport Taxi to continue operating as an independent private taxi business.

On June 29, 1976, UMTA approved a \$610,000.00 grant to the Transit District for implementation of a two year demonstration project. UMTA's approval failed to contain the mandatory findings required by §1602e of the Act, nor did the District's application contain the certification required by §1602d.

Believing that these procedural omissions reflect a more substantive failure to comply with the policies underlying the Act, the plaintiffs instituted this action to enjoin the federal appropriations and implementation of the project.

I. JURISDICTIONAL STATEMENT

The jurisdiction of the district court was invoked, as to the federal defendant, pursuant to 49 U.S.C. §1602, under 5 U.S.C. §702.

Jurisdiction over the municipal defendants was invoked pursuant to the Civil Rights Act, 42 U.S.C. §1983, under 28 U.S.C. §1343(3) and (4), for the alleged taking of the plaintiffs' property interest by municipal officials acting under color of law.

II. ISSUES PRESENTED

- A. DO §1602e AND §1602d OF THE URBAN MASS TRANSPORTATION ACT (UMTA), WHICH ON THEIR FACE SET FORTH REQUIREMENTS FOR FINANCIAL ASSISTANCE UNDER THE ACT, APPLY TO DEMONSTRATION PROJECTS FUNDED UNDER THE ACT?
- B. DOES IMPLEMENTATION OF AN UMTA-FUNDED MUNICIPAL TAXI SERVICE, APPROVED IN VIOLATION OF THE REQUIREMENTS OF THE ACT, VIOLATE THE FEDERAL STATUTORY RIGHT OF AN EXISTING TAXI FRANCHISE HOLDER TO BE FREE OF SUCH COMPETITION?
- C. DID THE DISTRICT COURT PROPERLY DECLINE TO REVIEW PLAINTIFFS' CLAIMS OF INFRINGEMENT WITH THEIR STATE FRANCHISE RIGHTS BY AN UMTA-FUNDED TAXI PROJECT?

III. STATEMENT OF THE CASE

A. HISTORY OF THE PROCEEDINGS

This action was initiated on December 6, 1976 in United States District Court for the District of Connecticut, Newman, J. At the time suit was commenced, no formal agreement had been executed by the Secretary of Transportation and the Transit District for appropriation of UMTA funds,¹ nor had any vehicles or equipment been delivered to the District. Plaintiffs sought a temporary restraining order enjoining any such appropriation by the Secretary and implementation of the project by the District. Similar preliminary and permanent injunctive relief was also requested.

Plaintiffs' motion for temporary relief was denied on December 9, 1976 after a chambers conference, the Court concluding that no imminent irreparable harm mandated issuance of a temporary order. A prompt hearing on the Plaintiffs' request for preliminary relief was scheduled and held on January 11 and 12, 1977, at which time Plaintiffs presented the testimony of Michael Gilbertie, vice-president of the taxi company, and Richard Bradley, Executive Director of the Transit District, as well as various

1.

UMTA had, however, appropriated \$25,000.00 to the District for study of the project's feasibility. See UMTA Approval dated June 23, 1975 [App. Ex. K]. The full grant contract was executed, in December of 1976, after this suit was commenced.

documents pertaining to the District's application and UMTA's approval of the project. At the conclusion of the hearing, it was agreed that the evidence presented would also serve as the basis for a ruling on Plaintiffs' request for permanent injunctive relief.

From January 1977 through March 1977, the parties awaited a ruling on Plaintiffs' requests for injunctive relief. On March 29, 1977, Plaintiffs, concerned by published reports that implementation of the project was imminent, reapplied for a temporary order to enjoin the project. The motion was again denied, on April 5, 1977, the court indicating it would rule on the case prior to the announced April 16, 1977 starting date of the project.

On April 13, 1977, three days before commencement of the project, the District Court denied Plaintiffs' requests for preliminary and permanent injunctive relief. Judgment was rendered on April 18, 1977, and timely notice of appeal to this Court filed.

B. STATEMENT OF THE FACTS

In February 1976, defendant-appellee Westport Transit District applied for a federal grant under the Urban Mass Transportation Act to implement a subsidized low cost, shared ride² municipal taxi service in the Westport area in direct competition with plaintiff-appellant Westport Taxi Service, Inc., a local taxi business owned and operated for over 20 years by plaintiffs-appellants Michael and Anthony Gilbertie (and their father) [R.B.3]; Application (Appendix Ex. C); [M.G. 2-4].* In the Transit District's application for UMTA funds, the district announced its intention to eliminate, without compensation to the Gilberties, Westport Taxi's existing franchise right to provide similar shared service, [See Application at B-3]³ a service

*References are to the trial testimony of Richard Bradley [R.B.], Executive Director of the Westport Transit District, and Michael Gilbertie [M.G.], vice-president of Westport Taxi.

² "Shared ride" service involves service to two or more individually paying passengers going to different locations.

³ In its application to UMTA, the District noted that under its "enabling legislation, the Westport Transit District will be required to recognize the existing 'Certificates of Public Convenience and Necessity' held by the two private taxi operators in Westport. These Certificates are held for (what will be known under the new regulations to be promulgated as) "premium ride taxi service." This recognition will be carried out with the specific qualification that shared ride services are not permissible under these existing certificates." Westport Transit District Application at B-2 [App. Ex. C]. Under current P.U.C.A. regulations, Plaintiffs are presently authorized to provide shared ride service, with the consent of the first passenger. See P.U.C.A. reg. 16-319-15 [App. Ex.I]

constituting a substantial portion of Westport Taxi's business [m.g. 28; Ruling on Motions at 4-5]. Although the District's proposal included plans for development of a comprehensive community transportation system under the District's auspices, [Appl. at A-2], the application did not contain the certification, required by §1602d of the Act, that hearings had been held to consider the impact of the project on the community [R.B.4].⁴

On June 29, 1976, UMTA approved a two-year grant to the Transit District in the amount of \$610,000.00 for implementation of the proposed taxi system [R.B. 56; Approval (App. Ex. D)]. Although the grant was to be used to acquire equipment that would directly compete with existing transit companies, the approval did not contain findings by the Secretary of Transportation, required by §1602e for all such financial assistance under the Act, that the project provided for the maximum participation feasible of the existing companies and assured adequate compensation under applicable state law for any taking of their property or franchise rights.

⁴ Although the District did hold a public hearing, there is no verification that the required economic, social and environmental criteria were properly considered. No hearings were held after substantial changes in the Application were made [R.B. 19-20].

The grant sought by the District and approved by UMTA was for a two-year demonstration project, authorized pursuant to §1605 of the Act. Although the project was, thus, "officially" of limited duration, the Transit District made clear its intention to continue the project beyond the two-year demonstration period. Projections for a third year of Service were included in the application [App. at C-8; R.B. 54], and correspondence to UMTA explicitly affirmed the District's hope to continue the project indefinitely [See letter from R. Bradley to P. Fish, March 29, 1976 (App. Ex. L)]. Indeed, the District anticipates the project will be continued and expanded after the two-year period, with additional government subsidies, if necessary, [R.B. 53-4].

There is little doubt that implementation of the proposed project will make it impossible for Westport Taxi to continue operations. The District is completely unregulated as to fare structure and operations and thus enjoys a substantial competitive advantage over Westport Taxi. The District's service will be provided in locations identical to those offered by Westport Taxi at a price below the actual cost of service. The District estimates revenue of \$127,000.00 and \$182,000.00, respectively, in the first two years of the project [R.B. 37]. Annual revenue of Westport Taxi (and the other smaller private taxi company serving Westport) is only \$200,000.00 [R.B. 38].

As Michael Gilbertie, vice-president of Westport Taxi testified, the company's profit structure has been marginal for several years [M.G. 22] showing a small loss in the past two or three years after family salaries were deducted [M.G. 45-46].

(Gilbertie and his brother Anthony have for the past four years been required to work 75 hours per week, drew salaries of \$10,500.00 each in 1975 [M.G. 42]. The Gilberties' 81 year old father works full-time as a dispatcher for the company and draws one-half the salary of his sons [M.G. 29]. Westport Taxi's already imperiled financial structure cannot help but collapse once the Transit District's project is implemented, especially if the District's fulfills its intention to eliminate Westport Taxi's shared-ride service, which, as the district court found, constitutes a substantial portion of Westport Taxi's business.

The Gilberties, but not Westport Taxi itself, were offered the opportunity to participate in the demonstration project as employees of the District. The District made clear that Westport Taxi's operations would, however, be superseded by the District's own "transportation company [R.B. 50]," and the District, not the Gilberties, would have ultimate responsibility for management and control of the project [R.B. 48]. Thus, the District would have final control of rates, salaries, and routes [R.B. 46-7]; the District would own all vehicles and equipment and contract

for repairs [R.B. 45]; the district would collect all revenues [Id.]. The Gilberties would be deprived of their position as independent taxi operators [M.G. 80] and their business would be effectively destroyed [Id.]. Although, under the District's proposal, the Gilberties would be paid an amount as employees [R.B. 49], at no time did the District offer to compensate the Gilberties for the diminution of the value of their existing franchise and its attendant good will [Id.].

The Gilberties declined to surrender their status as independent businessmen. Believing that the alternatives posed by the Transit District's proposal ran contrary to the objective of the Urban Mass Transportation Act to assist rather than destroy existing transit companies, the Gilberties commenced this action seeking to enjoin federal funding and municipal implementation of the project.

The Gilberties contended that the project had been approved without the findings by the Secretary of Transportation required by §1602e of the Act and without the certification in the District's application required by §1602d for such assistance under the Act. The Gilberties further asserted that the actions of the Transit District, in curtailing their existing franchise right to provide shared-ride service and implementing competitive taxi service without a finding of competitive necessity, constituted a taking of their federal and state statutory property

rights, without compensation, in violation of the Fifth and Fourteenth Amendments of the Constitution. The Gilberties sought temporary, preliminary and permanent injunctive relief; the Gilberties did not seek money damages. The certification and finding requirements of §1602d and §1602e of the Act were not fulfilled prior to approval of the grant.⁵

Although the language of §1602d and §1602e plainly applies to the federal assistance under the Act provided by UMTA in this case, the federal and local defendants contended below that the subsections do not apply to demonstration projects funded under §1605 of the Act. Plaintiffs respectfully submit that the district court's acceptance of this argument is in irreconcilable conflict with the express language of the statutes, and violates established rules of statutory construction.

Plaintiffs seek to enjoin the federal appropriations and municipal implementation of the project until the required findings are made. Plaintiffs contend that such findings cannot be made

5

Although the district court initiated that §1602e findings had, in fact, been made by the Secretary, Ruling at iii, n.10, the record is devoid of any such evidence. The UMTA approval [App. Ex. D] clearly contains no such findings. Bradley admitted at trial that no §1602d certification was contained in the District's application to UMTA.

as long as the project remains in its present form, since contrary to the purposes of the Act, the project promotes public ownership of Westport Transit services at the expense of existing private transit companies.

Plaintiffs do not seek to prevent federal assistance to Westport mass transit, but do seek to prevent their exclusion from the development of Westport taxi services and the unwarranted destruction of their taxi business.

IV. ARGUMENT

- A. THE UMTA GRANT MUST BE INVALIDATED, AND APPROPRIATIONS THEREUNDER ENJOINED, BECAUSE THE GRANT APPLICATION AND THE UMTA APPROVAL DO NOT CONTAIN THE CERTIFICATION AND FINDINGS REQUIRED BY THE ACT.

The plaintiffs contend that the UMTA grant to the Westport Transit District must be invalidated because the District's application and UMTA's approval do not comply with the mandatory requirements of the Act. In particular, the application does not contain the certification, required by §1602d of the Act, that hearings were held to consider the economic, social, and environmental impact of the project, and the approval fails to contain a finding by the Secretary pursuant to §1602e, that the program provides, to the maximum extent feasible, for the participation of existing private transportation companies and assures adequate compensation to such companies for any taking of their property or franchise interests.

In the district court, the federal and local defendants did not contend they had complied with §1602d and §1602e. Rather, the defendants claimed, and the district court held, that the two subsections do not apply to demonstration projects, funded under §1605 of the Act. This contention is clearly erroneous.

1. SUBSECTION 1602e PLAINLY APPLIES TO DEMONSTRATION PROJECTS.

Subsection 1602e of the Urban Mass Transportation Act provides that "[n]o financial assistance shall be provided under

this Act" (emphasis added) if such assistance is to be used, directly or indirectly, to acquire or compete with an existing mass transportation company, unless the Secretary makes the following findings:

(1) that such assistance is essential to a program, proposed or under active preparation, for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area;

(2) that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies; and

(3) that just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable state or local laws.⁶

Plaintiffs contend that the UMTA demonstration project grant awarded the Westport Transit District pursuant to §1605 is clearly financial assistance under "this Act" included in the requirements of §1602e.

The proposed project involves a federal grant for services that will directly compete with plaintiffs' pre-existing taxi service and will, as proposed, eliminate, without compensation, plaintiffs present franchise right to provide shared-ride taxi

6

Subsection 1602e also required the Secretary of Labor to certify that the "assistance complies with the requirements of section 1609(c) of this title." 49 U.S.C. §1602e(4). The UMTA approval contained such a certification by the Secretary of Labor.

service. Although the federal financial assistance to be provided thus falls within the ambit of §1602e, none of the three above findings required by the subsection were contained in the Secretary's approval of the project. The absence of such findings requires invalidation of the Secretary's approval and an injunction forbidding any federal appropriations.

The district court held that the requirements of §1602e do not apply to demonstration projects authorized by §1605 of the Act. Although §1602e, as written, plainly applies to all financial assistance provided under the Act, the district court concluded that "the legislative history and administrative construction of the Act indicate that §1602e is inapplicable to §1605 demonstration projects"[Ruling at 8].

Plaintiffs respectfully submit that the district court's disregard of the plain language of §1602e is in violation of basic rules of statutory construction and seriously undermines one of the major objectives of the Urban Mass Transportation Act.

a. The Statute is Clear On its Face and Requires No "Interpretation."

The law is abundantly well-established that when the language of a statute is clear and unambiguous, and would produce no absurd results, courts are not free to reject the ordinary

meaning of the words used in the statute. Helvering vs. Hammel, 311 U.S. 504, 511 (1941); Caminetti v. United States, 242 U.S. 470, 485 (1917); United States v. Blasius, 397 F.2d 203, 205-6 (2nd Cir. 1968), cert. dismiss., 393 U.S. 1008 (1969). As the Supreme Court stated sixty years ago, and has repeatedly reaffirmed,

"It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body that passed it, the sole function of the courts is to enforce it according to its terms."

Caminetti v. United States, 242 U.S. 470, 485 (1917)

Equally well-established is the rule that where a statute is clear on its face, courts may not resort to the legislative record to discern a contrary meaning. United States vs. Oregon, 366 U.S. 643, 648 (1961); Packard Motor Car Company v. N.L.R.B., 330 U.S. 485, 492 (1947); American Telephone and Telegraph Company v. FCC, 503 F.2d 612, 616 (2nd Cir. 1974); Wirtz v. Teamsters Local 191, 321 F.2d 445, 448 (2nd Cir. 1963). Indeed, as this Court has commented, "[t]he cases so holding are legion." American Telephone and Telegraph Company, supra at 616.

The statute at issue, §1602e, expressly and unequivocally applies to any financial assistance provided under the Act, and does not exempt demonstration projects, which undeniably are funded

under the Act, from its sweep. A court has no authority to read exceptions into a statute that is plain on its face. DeFreese vs. United States, 270 F.2d 730, 736 (5th Cir. 1959), cert. den., 362 U.S. 944 (1960).

Not only is the statutory language unequivocal, the subsection itself has, from its original passage in 1964, been contained in the section of the Act (§3) that sets forth the general requirements for the federal assistance programs more particularly described and limited in subsequent sections.⁷ The subsection's applicability to the entire Act is thus consistent with the remainder of §1602⁸ and the overall structure of the Act. Indeed, in writing the Act,

⁷
Section 3 has, from the outset, been entitled "Federal financial assistance" and "contains the basic provisions for the capital grant and loan program." 1970 U.S. Cong. Code and Admin. News 4096. To these general provisions, sections 4, 5 and 6 of the 1964 act added descriptions of the particular programs available and the unique conditions for funding of each. See 1966 U.S. Cong. Code and Admin. News 2700-02, which discusses the funding requirements of then §3C under the heading "Description of Program" and discusses long term and demonstration programs under the heading "Program Activity."

It is significant that under the Housing Act of 1961, superseded by UMTA in 1964, "comprehensive planning requirements" were applicable to all mass transportation funding. See 40 U.S.C. §461.

⁸
Subsections 1602d, e, f and g all apply to financial assistance provided "under the Act." Compare §1610c and §1604(i). See n.8, infra, and accompanying text.

Congress repeatedly differentiated between requirements designed to limit funding under a particular section and requirements applicable to funding of any kind under the entire Act.⁹

Section 1602e is thus plainly applicable to any financial assistance provided under the Act, and, accordingly, "there is no occasion for resort to the legislative record" Wirtz vs. Teamsters Local 191, supra, to seek a contrary interpretation. The district court's interpretation of §1602e is erroneous.

b. The Legislative History Supports the Plain Meaning of the Statute.

Even were reliance on the legislative record necessary and warranted for an interpretation of §1602e, there would be no reason to doubt the plain meaning of the subsection.

While the district court was undoubtedly correct in concluding that Congress intended the Secretary to have flexibility to implement demonstration programs [Ruling at 8], the legislative record demonstrates that Congress was equally concerned with protecting existing transit companies and their employees from the adverse effect of competitive, federally-subsidized mass transit services. See 1964 U.S. Cong. Code and Admin. News 2577, 2583-4.

The 1964 legislative history makes clear that Congress did not intend the Act to promote public ownership and operation of

⁹

See, e.g., §1610c and §1604(i).

mass transit facilities, but rather sought "to help existing private companies to remain in business and to improve the transportation services they offer." Id., at 2583-4.

§1602e was clearly designed to encourage the participation of private transportation companies in UMTA projects and to insure adequate protection to such companies and their employees from the adverse consequences of competitive services funded under the Act. As the demonstration project at issue illustrates well, the adverse effects of a demonstration project can be just as significant as those of a long-term project, and properly compel application of §1602e's protections.

The proposed project will directly compete with plaintiffs' business, offering equivalent taxi service at identical locations throughout Westport, with a greater number of vehicles available for hire than were previously offered by the two Westport private taxi companies combined [R.B. 30-37, 45]. Directors of the project estimate annual revenue for the two demonstration years of \$127,000.00 and \$182,000.00, respectively [R.B. 37], and acknowledge that the area currently generates only \$200,000.00 per year in taxi revenue [R.B. 38]. Under the proposed project application approved by UMTA, plaintiffs are to be deprived, without compensation, of their franchise right to provide shared-ride service [Appl. at B-2], (the major and most profitable

part of their business [Ruling at 4-5; M.G. 28]). Quite clearly, plaintiffs will never survive the two-year demonstration period [M.G. 22]-- but will be "demonstrated" out of business.¹⁰

Subsection 1602e reflects Congress' concern that such likely harm to existing private transit operators be minimized, and it is illogical -- and unsupported by any statement in the legislative record -- to assume that Congress intended to exempt from review the substantial impact of demonstration projects.¹¹ Indeed, if the purpose of the Act is to promote and improve private transit operations, demonstration projects cannot be allowed to undermine the continued existence of such companies.

10

As noted in the Statement of Facts, the District intends to continue the project beyond the two-year demonstration period, with additional federal, state and local funding, if necessary. See Letter from Richard Bradley to Paul Fish, March 29, 1976 [App Ex. L], and Bradley's testimony [R.B. 53]. Under such circumstances, any distinction between long term and demonstration projects completely disappears; certainly, UMTA cannot be allowed to circumvent the requirements of §1602e by funding long-term "demonstration" projects. This is especially true in light of the absence of any funding limit on the Secretary's authority to implement demonstration projects. 49 U.S.C. §1605b.

11

Logically, since the benefits of a demonstration project are not permanent or as substantial as those of a long-term project, it would seem that more careful consideration of a project's detrimental impact on existing companies would be warranted.

Applying the requirements of §1602e to demonstration projects will not, as the district court suggested, strip the Secretary of his flexibility to implement demonstration projects. Rather, it will only insure that demonstration projects which acquire or compete with existing transit operators will be subject to review to guarantee the maximum participation and protection of such companies, in accordance with the overriding goals of the Act.

c. The Protections of §1602e to Plaintiffs' Taxi Service.

In the lower court, the federal defendant argued that plaintiffs are not a "private mass transportation company"¹² within the meaning of the Act, and thus have no standing to challenge non-compliance with §1602e and are not entitled to the protections of the subsection.

As the district court observed, in rejecting the federal defendant's standing argument, (Ruling at 5), "a substantial portion of Westport Taxi's business comes from its shared-ride service [ID., at 4-5]," a service analagous to

12

"Mass transportation" is defined under the Act as "transportation by bus, rail or other conveyance, either publicly or privately owned, which provides to the public general or special services (but not including school buses or charter or sightseeing service) on a regular and continuing basis." 49 U.S.C. §1608(c)(5).

the very service to be provided under the demonstration project. It would, indeed, be anomalous for UMTA to provide funding for municipal mass transportation, which if performed privately, would not constitute mass transportation.

Moreover, contrary to the position set forth by the federal defendant, UMTA policy statements and public position papers have consistently interpreted §1602e to apply to private taxi operators and have explicitly acknowledged that UMTA will not provide financial assistance to a publicly-owned mass transportation company absent the finding required by §1602e that the proposed public program provides for the maximum participation of existing local operators, even if the existing taxi operators are not actually providing "mass transportation" services. See Department of Transportation Proposed Policy Statement on Paratransit Services, 41 C.F.R. 46412-3 [App. Ex. F]; Orski, Taxicab Management, "UMTA's View of the Role of Taxicabs in Public Transportation," p. 12, 13 (November 1976) [App. Ex. G]; Bautz, Taxicab Management, "UMTA's Current Involvement with the Taxicab Industry." p. 11, 13 (February 1977) [App. Ex. H].

As UMTA's Proposed Policy Statement on Paratransit Services makes clear, §1602e's protections extend to private

taxi operators, whether or not such taxi operators provide mass transportation service:

PROTECTION OF EXISTING PRIVATE OPERATORS

Provision of paratransit service will often be carried out most efficiently and effectively by private transportation companies. It is in the public interest not to foreclose private operators from engaging in the provision of paratransit service where such private operators are willing and able to provide this service. Pursuant to this policy and to Section 3(e) [\$1602e] and 4(a) [\$1603a] of the Act. UMTA will not provide financial assistance to any publicly-owned mass transportation company or private non-profit organization for the purpose of operating paratransit services in competition with paratransit services proposed or already being provided by an existing local taxi operator or other private transportation provider, unless it finds that the officially-developed local transportation program provides to the maximum extent feasible for the participation of private transportation companies (whether or not such companies are providing at the time mass transportation services).

41 C.F.R. at 46413 (emphasis added).

The language of this policy statement was explicitly reaffirmed in a recent article written by C. Kenneth Orski, UMTA's Associate Administrator for Policy and Program Development. Orski, Taxicab Management, "UMTA's View of the Role of Taxicabs in Public Transportation," p. 12, 13 (November 1976) [App. Ex.G].

Similarly, James A. Bautz, head of UMTA's Paratransit Demonstrations Divisions and liason with the private taxicab industry, has explained UMTA's policy to mean that

"...local taxi operators and other private carriers must be afforded a fair and timely opportunity to participate in the planning of community level and special transit service for the elderly and handicapped, and in the development of the local transportation plan. UMTA will not provide financial assistance to support public paratransit services in competition with similar private services unless honest efforts are made to involve private operators as providers of paratransit services." Bautz, Taxicab Management, "UMTA's Current Involvement with the Taxicab Industry," p. 11, 13 (February 1977). [App. Ex. H]

Any claim by the federal defendant that plaintiffs' shared and premium ride service is not within the scope of §1602e's protections is thus clearly belied by these repeated expressions by UMTA to the contrary. As private taxi operators, plaintiffs have standing to challenge non-compliance with §1602e and are entitled to the protections of the subsection.

d. The Absence of §1602e Findings is Not Merely a Technical Violation.

The absence of the findings required by §1602e is not merely a technical violation of the Act, but, rather, reflects a substantive failure to comply with the policies underlying the Act. The proposal, as set forth in the application for UMTA approval, does not provide for the maximum participation of existing private taxi companies, nor does it provide for any compensation to those companies for the elimination, as proposed in the application, of their franchise right to perform shared-ride taxi service.

i) Participation:

Contrary to the legislative goal of improving existing private transit service, the proposal, as set forth in the application, is designed to eliminate the two private taxi companies in Westport and establish, in their place, under the control and supervision of the Transit District, a new municipal taxi company employing the management and staff of the old companies. While it is, thus, true that plaintiffs were offered the opportunity to "participate" in the project, the participation was individual in nature and required surrender of their corporate identity and independence: The District, not the plaintiffs, would be responsible for establishing routes, salaries and fare structures; the District, not plaintiffs, would own all vehicles and equipment; the District, not plaintiffs, would collect and control all revenues. Plaintiffs' private taxi company would cease to exist, and plaintiffs, independent businessmen for the past 22 years, would become employees of the Transit District.

The public ownership and control of Westport's transit services, and the concomitant elimination of the existing private operators as independent transit entities, is precisely contrary to the stated goals of the Act to promote and improve existing private transit companies and to limit public assumption of transit service. The Act requires the maximum participation of private transit companies, so that, through federal funding such companies will ultimately be able to provide full service

without subsidy and to insure that transit services continue to be provided by existing private, rather than new public, entities. The Act is completely frustrated if existing private companies are effectively eliminated by a superseding public entity, even if the management and staff of the private companies are offered employment by the municipality. As Congress explicitly noted,

"[I]t is not the intent of this legislation to promote public ownership of urban transportation systems...The bill would help existing private companies to remain in business and to improve the transportation systems they offer." 1964 U.S. Cong. Code and Admin. News 2583-4.

ii) Compensation:

Under existing Conn. P.U.C.A. regulations, plaintiffs are permitted to provide shared-ride taxi service, with the consent of the first passenger. P.U.C.A. reg 16-319-15. Such shared-ride service constitutes over 50 percent of plaintiffs' revenue [M.G. 22].

Although the District's application explicitly provides for elimination of plaintiffs' present franchise right to provide such shared-ride service, see n.3, Supra, no provision is made for compensation to plaintiffs for the taking of this part of their franchise or for the inevitable decrease in their revenue. Contrary to the requirements of §1602e (3), state laws applicable to acquisition by a transit district of franchise interests were not followed. See 7-273e, Connecticut General Statutes. Under this proposal, if plaintiffs do not participate in the District's public transportation

company, they would simply be left with diminished rights of service and additional competition.

The proposed project is, thus, seriously in conflict with the primary goal of the Act -- promotion of private rather than public mass transportation systems. Subsection 1602e imposes finding requirements to insure compliance with this congressional objective, and the Secretary's failure to comply with the subsection invalidates the grant on procedural and substantive grounds.

2. SUBSECTION 1602d PLAINLY APPLIES TO DEMONSTRATION PROJECTS

Subsection 1602d requires any application for a grant or loan "under this Act" to be used to finance the acquisition of equipment which will substantially affect a community or its mass transportation service to contain a certification that the applicant:

"(1) has afforded an adequate opportunity for public hearings pursuant to adequate prior notice and has held such hearings unless no one with a significant economic, social or environmental interest in the matter requests a hearing;

(2) has considered the economic and social affects of the project and its impact on the environment and;

(3) has found that the project is consistent with official plans for the comprehensive development of the urban area."

The District's application to UMTA did not contain this certification. [R.B. 4]

The district court held that, despite the statute's plain language to the contrary, §1602d does not apply to demonstration projects, although it is not fully clear from the court's ruling whether that holding was based on an interpretation of the word "Act" in the first line of the subsection [Ruling at 6] or on the court's conclusion that a demonstration project does not "substantially affect a community or its mass transportation service [Ruling at 6-7]."

As with §1602d, it is hard to imagine how Congress could have been any more unequivocal in setting forth the applicability of §1602d's requirements to applications "under this Act". In light of this clear and unambiguous language, the subsection must be applied as written -- covering demonstration project applications funded under §1605 of the Act.¹³ United States vs. Oregon, 366 U.S. 643, 648 (1961); Caminetti v. United States, 242 U.S. 470 (1917); AT&T v FCC, 503 F.2d 612, 616 (2nd Cir. 1974); United States v. Blasius, 397 F.2d 203, 205-6 (2nd Cir. 1968), cert. dism., 393 U.S. 1008 (1969); Wirtz v. Teamsters Local 191, 321 F.2d 445, 448 (2nd Cir. 1963).

¹³

Township of Ridley v. Blanchette, F. Supp (E.D.Pa. 1976), cited by the district court, held §1602d inapplicable to §1605 contracts. In the instant case, the demonstration project has been funded by grant, specifically included in §1602d's protections. To the extent that Ridley holds §1602d otherwise inapplicable to §1605 demonstration projects, plaintiffs contend its holding is erroneous.

It is significant that at the same time §1602d was promulgated, the word "grant" was added to §1605 to clarify the Secretary's authority to award grants for demonstration projects. The contemporaneous use of the word "grant" in both subsections is persuasive evidence that Congress intended §1602d to apply to demonstration projects. cf. Meyer v United States, 175 F 2d 45, 47 (2nd Cir. 1949); United States v Vargas, 380 F. Supp. 1162, 1166 (E.D.N.Y. 1974).

The certification requirements of §1602d are not, however, applicable to all demonstration projects. Rather, the requirements of the subsection apply only to applications for grants or loans to finance the purchase or improvement of facilities or equipment which will "substantially affect a community or its mass transportation service..." Applications not involving such equipment or proposals of lesser magnitude are not subject to the subsection's certification requirement. It is hardly unreasonable for Congress to impose such a requirement on substantial projects, be they long term or demonstration -- in order to insure the overall consistency of a community's mass transportation system.

As noted, the district court held that the proposed project "is a demonstration project only and does not involve the more significant commitment of resources and

more substantial effect on the community necessary to bring the hearing and certification requirements of §1602d into effect. [Ruling at 7]." As footnote 7 of the court's ruling makes clear, this holding was premised, however, on the conclusion that §1602d was inapplicable to §1605 projects, rather than on a factual assessment of the impact of the proposed project.

There can be no doubt that the project as issue "substantially affects" the Westport area and its mass transportation systems. In its application to UMTA, the Transit District described the proposal as "seeking to develop a comprehensive transportation system," to serve the needs of the Westport area. [App. at A-2]. The program is designed to centralize all Westport transit services and to place under the District's control "regulatory responsibility for the provision of all transportation services within its boundaries, [Id., at A-19]." The proposal envisions creation of a "private transportation company" to serve the Westport area, and revision of existing taxi franchise rights [Id., at B-2-3]. The district will also assume control of fare structures [Id., at B-3].

Moreover, although the "demonstration" period is only two years, the Transit District has made known its intention to continue the project in ensuing years. In a letter from

Richard Bradley, Executive Director of the District, to UMTA on March 29, 1976, Bradley stated:

"In answer to your question for further clarification of the issue of continuation of the demonstration project beyond the second year, it is the position of the Transit District to strongly support such continuation and the economic projections for costs beyond the second year show that this is a reasonable alternative to pursue.
[App. Ex. L]

Bradley further indicated that additional local, state and federal assistance would be sought to continue the project after the first two years. Indeed, projections have already been made for the third year of operations, and Bradley testified at the hearing that he hopes and anticipates the project will continue beyond that time. UMTA's approval of the project specifically notes the District's intention to continue the service beyond the demonstration period.

The proposed project is, thus, one which will substantially and radically affect the provision of mass transportation services in the Westport area for years to come. Any other conclusion is clearly erroneous.

The certification requirements of §1602d are, therefore, applicable to the District's application. The omission of the requisite certification invalidates the Secretary's approval of the grant.

B. THE DEMONSTRATION PROJECT UNCONSTITUTIONALLY INFRINGES UPON THE PLAINTIFFS' FEDERAL AND STATE STATUTORY RIGHTS TO BE FREE OF SUCH COMPETITION, AND, ACCORDINGLY, IMPLEMENTATION OF THE PROJECT MUST BE ENJOINED.

The plaintiffs also sought in the district court to enjoin the Transit District and its directors from implementing the proposed project. The plaintiffs contended that the establishment of the competitive municipal taxi system constituted a taking, by city officials, without compensation, under color law, of the property interest inherent to their franchise, in violation of the fifth and fourteenth amendments of the United States Constitution.

The plaintiffs assert a taking of two separate property interests: first, their federal statutory right to be free from UMTA hindered competitive taxi services absent compliance with §§1602d and e of the Act. See Hardin vs. Kentucky Utilities Co., 390 U.S. 1,6 (1968); and second, their state statutory right to be free from limitation of their existing franchise rights. See Frost vs. Corporation Commission, 278 U.S. 515 (1929).

The district court rejected the plaintiffs' requests for injunctive relief against the Transit District, holding no violation of the plaintiff's federal statutory right and declining to review plaintiffs' state statutory claim. The plaintiffs respectfully submit the district court's holdings were in error.

1. PLAINTIFFS HAVE A FEDERAL STATUTORY RIGHT, UNDER §1602e OF THE ACT TO BE FREE OF UMTA-FUNDED COMPETITION APPROVED IN VIOLATION OF THE SUBSECTION.
-

In Hardin vs. Kentucky Utilities Co., 390 U.S. 1, 6 (1968), the Supreme Court held that Congress may enact statutes creating legal rights, the invasion of which is judicially reviewable, even though no protected interest would exist without the statute. In Hardin, the right created was a public utility's right, under the Tennessee Valley Authority Act, to be free from competition by the Authority in areas prohibited by the Act. Although the Court ultimately rejected the utility's interpretation of the areas in which the Authority could lawfully compete, the Court made clear that had the Authority competed improperly, injunctive relief would lie.

Since Hardin, the Court has also made clear that interference by state or local officials with a federally created statutory right may be enjoined under the Civil Rights Act, 42 U.S.C. 1983. O'Shea vs. Littleton, 414 U.S. 488, 492 n.2 (1974); cf., Trafficante vs. Metropolitan Life Insurance Co., 409 U.S. 205, 212 (1972).

The plaintiffs contend that the §1602e and §1602d of the Urban Mass Transportation Act confer upon them a federal statutory right to be free of UMTA-funded competition absent compliance with the finding and certification requirements of the two subsections. Plaintiffs seek to enjoin the deprivation,

without compensation, of this federally protected property interest by the directors of the Transit District under 42 U.S.C. §1983. There is no question that the Civil Rights Act applies to an improper taking of property under color of law. Lynch vs. Household Finance Corporation, 405 U.S. 538, 552 (1972).

The district court implicitly acknowledged the existence of the plaintiffs' federally-protected property interest in being free from government sponsored competition, noting that the right would derive from Congress' intention under the Act to encourage to the maximum extent feasible the participation of private enterprise and to compensate private companies for acquisition of their franchises or property. Ruling at 12. The Court held, however, that UMTA's "substantial compliance" with these policies provided sufficient protection of the plaintiffs' statutory rights and validated the competitive UMTA project.

The plaintiffs respectfully contest the district court's conclusion that, as a matter of law, substantial compliance with the requirements of §1602e and §1602d is sufficient to vindicate the plaintiffs' federal right to be free from UMTA-funded competition, and further dispute the district court's factual finding of such substantial compliance.

a. Substantial Compliance is Not Sufficient, as a Matter of Law

The extent of the plaintiffs' right to be free of the Transit District's competitive demonstration project is necessarily defined by statute. Because the district court held that §1602e and §1602d do not apply to demonstration projects, it perceived no statutory right to the findings and certification required by the subsections, but only a more general right to compliance with the policies and objectives of the Act prior to funding of a demonstration project. Ruling at iii, n 10.

The plaintiffs have previously argued that §1602e and §1602d are, in fact, applicable to demonstration projects, and if so, the plaintiffs are entitled to be free of UMTA competition unless the requirements of the two subsections are met. Those requirements include more than "substantial compliance" with the policies of the Act and mandate specific findings by the Secretary and a certification by the District. In the absence of actual compliance with §1602e and §1602d implementation of the project would infringe plaintiffs' federal property right, and injunctive relief against the Transit District to preclude such infringement is warranted.

b. UMTA Has Not Substantially Complied With the Goals of the Act.

Assuming, arguendo, that substantial compliance with the policies of the Act is sufficient to authorize UMTA-funded competition, no finding of substantial compliance is possible in this case. As argued previously, the proposed demonstration

project provides for public assumption of Westport Transit services and the destruction of the two existing private taxi companies. While the plaintiffs, as individuals, were offered the opportunity to participate in the project, participation would require them to become employees of the Transit District and to abandon their corporate taxi business. Furthermore, although the District's application plainly provided for the District's elimination of an important aspect of the plaintiffs' franchise rights, no provision for compensation to the plaintiffs were made. Under such circumstances, it is difficult to find support for the district court's finding of substantial compliance with the objectives of the Act, and such a finding is clearly erroneous.

The plaintiffs' federal statutory right to be free of an UMTA-funded demonstration project, whether derived directly from §1602e and §1602d or whether drawn from the legislative objectives of the Act, is clearly infringed by the proposed project. Such interference - or taking- of plaintiffs' property right by the District, under color of law, is cognizable under the Civil Rights Act, and injunctive relief is warranted.

2. PLAINTIFFS HAVE A STATE STATUTORY RIGHT TO BE FREE OF INFRINGEMENT WITH THEIR FRANCHISE

In its application to UMTA, the District set forth its intention, as part of the project, to eliminate the plaintiffs' present franchise right to provide shared-ride service, a service

that generates a substantial portion of the plaintiffs' revenue. Plaintiffs contend that this assumption of their franchise rights constitutes a taking of their property, without compensation, in violation of 7-273e, Connecticut General Statutes. Plaintiffs also contend that the District's establishment of a municipal taxi service without a finding of competitive necessity-- either by the state Public Utilities Control Authority or by the District itself -- constitutes a violation of the plaintiffs' right under their existing P.U.C.A. certificate to be free of unwarranted competition. Frost vs. Corporation Commission,
14
supra.

The district court declined to reach the merits of the plaintiffs claims in this regard holding that even if the plaintiffs' claims were valid, injunctive relief was not warranted and further holding that determination of the plaintiffs' state statutory claims should properly be left to the state court.

- a. Under the Facts of This Case, Injunctive Relief is Warranted.

14
Tennessee Power Company vs. Tennessee Valley Authority, 306 U.S. 118 (1939), and Alabama Power Company vs. Ickes, 302 U.S. 464 (1938), do not hold to the contrary. Although these cases hold that a public utility has no right to be free of lawful municipal competition, the cases do not hold that unregulated and unnecessary competition is therefore valid. Indeed, in both cases, the competitive service had been found necessary for the welfare of the public served. In the instant case, the Transit District has sought to implement a service without a finding of necessity.

While it is true that it may be possible to calculate with reasonable precision the extent of the economic injury the proposed project will inflict upon the plaintiffs and their business, injunctive relief is nonetheless appropriate.

This Court has recognized that when the potential economic loss is so great as to threaten the existence of a party's business, injunctive relief is warranted, even though the amount of direct financial loss is ascertainable. Semmes Motors, Inc. vs. Ford Motor Company, 429 F.2d 1197, 1205 (2nd Cir. 1970). As Judge Friendly observed in Semmes, in upholding the issuance of a preliminary injunction in a case analagous to the instant case:

Of course, Semmes' past profits would afford a basis for calculating damages for wrongful termination, and no one doubts Ford's ability to respond. But the right to continue a business in which William Semmes had engaged for twenty years and in to which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles and, not to live on the income for a damages award. Id. at 1205

In this case, there is little doubt that the plaintiffs' already marginal business cannot survive the elimination of a substantial portion of its revenue, especially when coupled with the additional competition to be generally provided by the demonstration project. Injunctive relief is therefore warranted to prevent the District's usurpation of the plaintiffs' franchise interest.

b. The District Court Improperly Refused to Review Plaintiffs' Claims on the Merits.

Plaintiffs' right to be free from municipal usurpation of all or part of their franchise without compensation, is clearly established. See §7-273e, Connecticut General Statutes; United States v Brooklyn Union Gas Company 168 F.2d 391 (2nd Cir. 1948). No difficult interpretation of state law justified the district court's refusal to review the claim, nor does the possible existence of state reverse condemnation proceedings warrant federal abstention. Steffel v Thompson, 415 U.S. 452, 472-3 (1974). The district court, thus, improperly refused to review this aspect of plaintiffs' claim, and the claim should be remanded for consideration on the merits by the district court.

While the scope of a transit district's authority to establish competitive transit services is more difficult, compare §7-273b (g) with Frost v Corporation Commission supra. See n. 14, supra, under the circumstances of this case, the district court should not have declined to review the claim. In view of plaintiffs' necessary invocation of federal jurisdiction to review their claims against the federal government,

in view of the intimate relationship between the state and federal claims, and in view of the need for prompt resolution of the plaintiffs' claims, the district court should have considered the merits of plaintiffs' state statutory claims.

Plaintiffs' respectfully request this Court to remand claims to the district court for full determination.

V. CONCLUSION

For the foregoing reasons, the district court erred in denying appellants' request for injunctive relief.

The ruling of the district court must be reviewed, and appropriate injunctive relief granted.

RESPECTFULLY SUBMITTED

BY Richard A. Silver
RICHARD A. SILVER
DAVID S. GOLUB
733 Summer Street
Stamford, Connecticut 06905
Attorneys for the Plaintiffs-
Appellants